of contract by failing to send a grader or fresh grader duly licensed to grade the timber or by failing to get check-grading done by the Forest Department.

Another allegation in the defence was that the plaintiffs committed a breach of the contract by failing to nominate a ship although the defendant at his timber yard in June, July, August and September, 1960, frequently verbally requested Chan to name a ship upon which the light red meranti was to be loaded. It seemed to me that this allegation was absurd as the defendant did not succeed in producing even one parcel of 100 tons of light red meranti.

The last question I had to deal with was the question of damages. In December, 1959, the plaintiffs entered into a contract with Ackworth & Whitehead Pty. Ltd. of Sydney, Australia, for the supply of 3000 tons of light red meranti. The defendant did not dispute that he knew that the plaintiffs entered into a contract with him for the purpose of fulfilling their obligation under their contract with Ackworth & Whitehead. If the defendant had in fact delivered the 400 tons under his contract with the plaintiffs, the plaintiffs would have made a profit of $16,200. This figure is arrived at in this way. The c.i.f. price per ton payable by Ackworth & Whitehead was £ (Sterling) 39.12.6. per ton. The net amount per ton which the plaintiffs would have realized was £(Sterling) 30. 7. 10. after deducting freight, which was £9 per ton, and insurance charge, which was 4s. 8d. per ton. At the rate of 2/4d per dollar this amount comes to $260.50 per ton. The price which the plaintiffs agreed to pay the defendant was $220 per ton. The profit which the plaintiffs would have made was $40.50 per ton. For 400 tons this works out to $16,200. Ackworth & Whitehead cancelled their contract with the plaintiffs in October, 1960, when there was a shortage of 444 tons. I accepted the evidence of Leong that the plaintiffs entered into contracts with the defendant because there was a short supply of light red meranti in the Federation of Malaya, and that normally the plaintiffs got their supply from Kuala Lumpur, Pahang and Seremban. In August and September, 1960, Leong asked Chan to look for supplies of light red meranti in Singapore, but Chan was unable to get such supplies. P. G. Hase, the director of Malayan Timber & Trading Co. Ltd., Singapore, who was called by the defendant, testified that during the period June to September, 1960, it was unlikely that there was a surplus of light red meranti in sawmills in Singapore for new contracts, and that most of the sawmills in Singapore were tied to one or more exporters by constant dealings. He added that his company was the largest exporter of timber in Singapore and Malaya combined. As I was satisfied that the plaintiffs could do nothing to mitigate the loss suffered by them I assessed damages at $16,200.

For the above reasons I gave judgment for the plaintiffs for $23,805.82 and costs of the claim and dismissed the counterclaim with costs.

Judgment for the plaintiffs.

Solicitors: *D. G. Ironside*; *Braddell Bros.*

WICKRASOORIYA v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) March 31, 1964]

[Malacca — Criminal Appeal No. 19 of 1963]

Penal Code, s. 408 — Criminal breach of trust by servant — Failure to credit company with amounts received — Witholding vouchers — Dishonest intention — Inference from surrounding circumstances.

The appellant an accountant employed by Sime Darby & Co., Malacca, was convicted on two charges of criminal breach of trust in respect of monies he had received and payable to the company. It was his duty, *inter alia*, to receive monies payable to the company, to bank them and to keep proper accounts. The two sums involved in this case related to credit sales by the company, the vouchers for which were removed by the appellant from the office without authority.

Held: (1) mere non-accounting or temporary retention of money was not an offence unless there was dishonest intention;

(2) in this case the only inference that could be drawn from the surrounding circumstances was that the appellant deliberately withheld the vouchers to ensure that the amounts involved were not credited to the company accounts while he retained the money and that his intention in doing so was dishonest.

Cases referred to:—

(1) *Emperor* v. *Chaturbhuj Narain Choudhury* A.I.R. 1936 Patna 350; 37 Cr. L.J. 877.

(2) *Harakrishna Mahatab* v. *Emperor* A.I.R. 1930 Patna 209; 31 Cr. L.J. 249.

(3) *Crown* v. *Dina* A.I.R. 1925 Lahore 411; 26 Cr.L.J. 149.

CRIMINAL APPEAL.

D. A. Devadason for the appellant.

Abdul Razak bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant was tried on three charges before the President, Sessions Court, Malacca. The charges were:—

"*1st Charge:* That you on or about the 17th day of January 1962 at Malacca in the State of Malacca, being a servant in the employment of Sime Darby and in such capacity entrusted with certain property to wit, $39.70 cash committed criminal breach of trust in respect of the said property and thereby committed an offence punishable under section 408, Penal Code.

2nd Charge: That you on or about the 15th day of January 1962 at Malacca in the State of Malacca, being a servant in the employment of Sime Darby and in such capacity entrusted with certain property to wit, $12.00 cash committed criminal breach of trust in respect of the said property and thereby committed an offence punishable under section 408, Penal Code.

3rd Charge: That you on or about the 1st day of March 1962 at Malacca in the State of Malacca, being a servant in the employment of Sime Darby and in such capacity entrusted with certain property to wit, $46.30 committed criminal breach of trust in respect of the said property and thereby committed an offence punishable under section 408, Penal Code."

The third charge was dropped during the course of the trial.

The learned president convicted the appellant on the two charges and sentenced him to three years' imprisonment on each charge, the sentences to run concurrently. Against the conviction and sentence he has appealed.

The appellant was an accountant employed by Sime Darby & Co. at their Malacca branch. It was his duty, *inter alia,* to receive monies payable to the company, to bank them and to keep proper accounts. The two sums involved in this case relate to credit sales by the company.

The procedure followed in such cases is as follows. The appellant would issue a book of receipts known as "D" receipts to the bill collector or canvassing salesman. On receipt of any payment from a customer during his normal rounds the collector or salesman would set out the particulars in his receipt prepared in quadruplicate. One of these, a temporary receipt, signed by the collector would be given to the customer. The other three comprising the original receipt, the posting voucher and the control voucher would be taken to the accountant together with the money received from the customer. He would then sign these as the cashier. The original would be sent to the customer, the posting voucher to the financial clerk for him to post the amount in the ledger, and the control copy to the clerk-cashier for entry in the cash book. The cash would be retained by the accountant.

On 17th November, 1961, P.W.11, a shop assistant, bought goods from the company for which he signed a credit sales invoice P2C. On 17th January, 1962, he paid the collector $39.70 for the goods supplied and received a temporary receipt P2B, and later the official "original" receipt P2A for the amount dated 17th November, 1961. On 9th October, 1961, P.W.12, the proprietor of a shop, signed an invoice P2F for goods supplied by the company. On 15th January, 1962, he made a payment of $12 for the goods and was given a temporary receipt P2F. He also received in due course the official receipt P2D. On 20th May, 1962, Mr. Anderson, the manager of the Malacca branch, asked the appellant for a schedule of overdue debtors of the company for the months of December 1961 and January, February and March 1962, which was missing from the file. The appellant was asked to produce it by 9 a.m. The appellant, however, left the office and failed to return. Mr. Anderson took with him another official of the company, Mr. Freeman, and met the appellant's wife who told them that the appellant had gone to the hospital. The appellant was not to be found in the hospital and Mr. Anderson returned to the appellant's house where he received a bunch of keys from the appellant's wife. He returnd to the office, opened the appellant's desk and recovered a cash box which contained a cheque for $50, cash $16.39 and two requisition slips, one for $10 and the other for $36. On 30th May, 1962, Mr. Anderson and Mr. Freeman again visited the appellant's home. Nobody was in but they found a plastic tray containing receipts and cheques belonging to the company. No one, according to Mr. Anderson, was authorised to remove such documents and cheques from the office. It was then found that the two sums of $39.70 and $12 paid on 17th January and 15th January, 1962, respectively, had not been entered in the company's books.

According to P.W.9, the company's salesman, he received the two sums from the customers and had handed them to the appellant. He then signed the two receipts, P2A and P2D, for the amounts and kept the cash.

P.W.5, the senior ledger clerk of the company, said that no entries were made in the ledger in respect of these two sums as the relevant posting vouchers were not submitted to him.

P.W.8, the clerk-cashier in the office, said that she would sometimes assist the appellant in entering the amounts shown in receipts signed by the appellant in the daily cash book. The receipt numbers would be set out against the relevant entries. There was no entry in the cash book P8 relating to either of the said two sums. That was because she had not received the control vouchers.

Normally, the posting vouchers and the control vouchers would be taken by P.W.6, the assistant cashier, after they had been signed by the appellant to the clerks concerned, namely, P.W.5 and P.W.8, for entry in the ledger and the cash book, but if through inadvertence P.W.6 had omitted to submit the vouchers, the mistake would have been discovered at the end of the month.

There is evidence in this case that the appellant had received monies payable to the firm and in breach of his duty had failed to credit the firm with the said amounts. It was argued for the appellant, and this is the only ground of appeal that merits any serious consideration, that the two sums of money might be in the cash box and that all the appellant did was to retain the money. Mere non-accounting or temporary retention of money is of course not an offence unless there is dishonest intention.

In the case of *Emperor* v. *Chaturbhuj Narain Choudhury* [1] Rowland J. after considering most of the authorities on the point, said at page 352:—

"It would serve no useful purpose to examine the facts of all those decisions in the attempt to arrive at a rule enabling one to say that this or that overt act will or will not amount to criminal misappropriation or breach of trust. I am quite unable to deduce any such hard and fast rule from the decision, and I do not think that there is any such rule."

He then said that the principle to be followed was correctly laid down in two cases — (1) *Harakrishna Mahatab* v. *Emperor*,[2] and (2) *Crown* v. *Dina*.[3]

In the first case Fazl Ali J. said:—

"It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest. But..... the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should however not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention."

The second case, according to his Lordship, proceeded directly on the view that the mental act or intent to deprive the master of his property is the gist of the offence. With this statement of the law I respectfully agree.

The intention of the appellant in failing to credit the company with the two amounts received by him and in retaining them could be inferred from the surrounding circumstances. He failed to produce the schedule of "overdue" debtors when asked to do so and failed to turn up at the office until five days later. The two sums were not entered in the company's books because the necessary vouchers were not submitted to the clerks concerned. These vouchers were among the documents found by Mr. Anderson in the appellant's house, documents which the appellant had no authority to remove from the office. The appellant kept the cash box and the key thereof.

The only inference that can be drawn is that the appellant deliberately withheld these vouchers to ensure that the amounts involved were not credited to the company accounts while he retained the money and that his intention in doing so was dishonest. The learned President disbelieved the appellant's story that P.W.6, the assisant cashier, must have omitted to send the vouchers for the amounts therein to be entered in the company's books and convicted him and rightly so. I see no reason to interfere with the sentence.

The appeal is dismissed.

Appeal dismissed.

TAN TEK YAN v. SAMUEL

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) April 6, 1964]

[Singapore — Federal Court Civil Appeal No. 18 of 1963]

Practice and Procedure — Appeal — Finding of fact — Credibility of witnesses — When appellate court will upset such finding.

Practice and Procedure — Appeal — Point not taken at trial — Whether it can be taken on appeal.

Landlord and Tenant — Non-controlled premises — Written tenancy agreement — Termination of tenancy — Withdrawal of action — Tenant remaining in possession — Rent neither tendered nor demanded — Subsequent notice to quit — Allegation of supplementary oral agreement — Whether there was waiver of notice to quit.

An appellate court even though it is disposed to come to a different conclusion on the printed evidence will not upset the finding of a trial judge on a question of fact which turned solely on the credibility of witnesses unless it is satisfied that the trial judge was plainly wrong.

A point, not taken at the trial, and presented for the first time in the appellate court ought to be most jealously scrutinised. An appellate court ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy has arisen at the trial. The rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility could prevent the point from succeeding, it cannot be taken afterwards.

Cases referred to:—

(1) *The Tasmania* (1890) 15 App. Cas. at p. 227.

(2) *Ex parte Firth, In re Cowburn* (1882) 19 Ch. D. 419, C.A.

FEDERAL COURT.

R. H. V. Rintoul for the appellant.

C. S. Wu for the respondent.

Wee Chong Jin C.J. (Singapore): This is an appeal from the judgment of Azmi J. in favour of the respondent in an action for recovery of possession of non-controlled premises and for rent and mesne profits.

The appellant became the tenant of the premises under a written tenancy agreement dated 18th August 1960 at a monthly rent of $250. Some months after the appellant had entered into possession under this agreement, the respondent terminated the tenancy on 30th April 1961 by giving the appellant a notice to quit dated 29th March 1961.